

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(46)S
Sales Tax
December 29, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030618B

On June 18, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from SMS Acquisition, Inc., 7135 Charlotte Pike, Suite 100, Nashville, TN 37209. Petitioner, SMS Acquisition, Inc., provided additional information pertaining to the Petition on October 9, 2003.

The issue raised by Petitioner is whether the various services it provides to airlines are subject to sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner generally provides personnel to render services at airports solely to commercial airlines. Charges for such services are computed by the number of personnel and hours worked for each airline. Charges for maintenance of tangible personal property and real property include the cost of materials as well as hourly labor charges. Petitioner bills the airlines directly, including a 5% surcharge for port fees.

Where several airlines share the same terminal/concourse area, the hourly charges are apportioned to each airline. Petitioner receives information from each airline relating to the number of passengers each airline handled at that facility. Petitioner apportions the services provided at that facility and bills each airline directly for its proportionate share.

Petitioner separately states charges for the following services on its invoices:

1. Ramp service - emptying the aircraft's lavatories and de-icing the aircraft.
2. Cabin appearance - personnel clean the aircraft.
3. Repair and maintenance of small equipment and vehicles (not the aircraft) - Petitioner provides tangible personal property as well as labor.
4. Repair and maintenance of real property - Petitioner provides tangible personal property as well as labor.
5. Janitorial service - personnel clean areas of the airport.
6. Security services - personnel guard doors and hangars.
7. Positive claim - personnel match ticketed baggage with passengers' tickets.
8. Ticket checkers - personnel verify that the name on the ticket matches the boarding passenger.

9. Electric cart - passenger movement through concourse of airport; Petitioner does not own the carts. Sample invoices indicate that the charges are computed solely by the number of hours worked by Petitioner's employees.
10. Wheelchair service - pushing passengers that require wheelchairs; in most instances Petitioner does not own the wheelchairs. Sample invoices indicate that the charges are computed solely by the number of hours worked by Petitioner's employees.
11. Skycap service - curbside baggage check-in.
12. Baggage handling - personnel handle baggage after check-in and load baggage into the aircraft; the baggage conveyors are not owned by Petitioner.
13. Usher/Escort service - escorting under aged children and passengers without visas to appropriate area.
14. Depreciation fee - charge to offset expenses for equipment (fuel, oil, tires, repairs, etc.) owned by Petitioner and used in performing services to the airline.
15. Port fee - Petitioner pays a "franchise fee" to the airport and passes that fee onto the airlines by the application of a five (5) percent surcharge.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(3) Receipt. *The amount of the sale price of any property and the charge for any service taxable under this article . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery . . . but excluding any credit for tangible personal property accepted in part payment and intended for resale. . . .* (Emphasis added)

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or *repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land*, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed. . . . (Emphasis added)

* * *

(17) Commercial aircraft. *Aircraft used primarily (i) to transport persons or property, for hire, (ii) by the purchaser of the aircraft primarily to transport such person's tangible personal property in the conduct of such person's business, or (iii) for both such purposes.* (Emphasis added)

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1105(c) of the Tax Law provides, in part:

The receipts from every sale, except for resale, of the following services:

* * *

(3) *Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business . . . whether or not any tangible personal property is transferred in conjunction therewith, except:*

* * *

(v) such services rendered with respect to commercial aircraft, machinery or equipment and property used by or purchased for the use of such aircraft as such aircraft, machinery or equipment, and property are specified in paragraph twenty-one of subdivision (a) of section eleven hundred fifteen of this article; . . .

* * *

(5) *Maintaining, servicing or repairing real property, property or land*, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building. . . . (Emphasis added)

* * *

(8) *Protective and detective services, including, but not limited to*, all services provided by or through alarm or protective systems of every nature, including, but not limited to, *protection against burglary, theft, fire*, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and *guard, patrol and watchman services of every nature . . .* whether or not tangible personal property is transferred in conjunction therewith. (Emphasis added)

Section 1115(a)(21) of the Tax Law exempts from the sales tax imposed by section 1105(a) of the Tax Law and from the compensating use tax imposed under section 1110:

Commercial aircraft primarily engaged in intrastate, interstate or foreign commerce, machinery or equipment to be installed on such aircraft and property used by or purchased for the use of such aircraft for maintenance and repairs and flight simulators purchased by commercial airlines. (Emphasis added)

Section 1119(c) of the Tax Law provides, in part:

A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one. . . .

Section 526.5 of the Sales and Use Tax Regulations provides, in part:

(a) Definition. The word receipt means the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise. The following subdivisions of this section discuss elements of a receipt.

* * *

(e) Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Example 1: A photographer contracts with a customer to furnish photographs at \$50 each in addition to expenses. The customer is billed as follows:

Photographs (2)	\$100
Model fees	60
Meals	10
Travel	25
Props (Flowers)	5

Total due	\$200

Receipt subject to tax is \$200

Example 2: An appliance repairman charges \$10 per hour plus expenses when on a service call. The customer is billed as follows:

3 hrs. at \$10	\$30
Travel	15
Parts	20
Meals	5

Total due	\$70

Receipt subject to tax is \$70

* * *

(g)(3) A charge for transporting or delivering property by a transportation or delivery company to the person or business requesting that the property be transported or delivered is not a receipt subject to tax, since transportation and delivery are not themselves services subject to tax.

Section 527.7(b) of the Sales and Use Tax Regulations provides, in part:

(1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

* * *

(3) When the service of maintaining, servicing or repairing real property is performed in conjunction with the transfer of title to tangible personal property, the price of the tangible personal property is also subject to tax.

Section 528.10(b) of the Sales and Use Tax Regulations provides, in part:

(1) An airline is: (i) an air carrier of persons, property and mail operating under a certificate of public convenience and necessity issued by the Civil Aeronautics Board, or a foreign air carrier holding an equivalent certificate issued by the carrier's respective sovereign government;

(ii) an air carrier holding a certificate for all-cargo air service issued by the Civil Aeronautics Board; or

(iii) an air taxi operator, who is classified by the Civil Aeronautics Board as a commuter air carrier, or who (a) performs at least five round trips per week between two or more points, and publishes flight schedules which specify the times and days of the week and places between which such flights are performed, or (b) transports mail by air pursuant to contract with the United States Postal Service. . .

(2) Air taxi operators and commercial operators of small aircraft holding air taxi certificates issued by the Federal Aviation Agency, which enable these operators to engage in carrying passengers or cargo for hire in air commerce, but who are not commuter air carriers, are not airlines within the meaning of the Tax Law.

Section 534.5 of the Sales and Use Tax Regulations provides, in part:

(a)(1) Authorization. A refund or credit is allowable to the purchaser of tangible personal property for any New York State or local sales or compensating use tax paid thereon where such tangible personal property is later used by such purchaser in the rendering of a service subject to sales tax under paragraph (1), (2), (3) or (5) of subdivision (c) of section 1105 of the Tax Law, or the compensating use tax under section 1110 of the Tax Law which is limited to:

* * *

(iii) installing, maintaining, servicing, or repairing tangible personal property . . .

(iv) maintaining, servicing, or repairing real property or land

(2) Limitations. However, a refund or credit of tax paid on tangible personal property by the purchaser rendering the services outlined in subparagraphs (i) through (iv) of paragraph (1) of this subdivision is only allowable where:

(i) the tangible personal property has become a physical component part of the property being serviced; or

(ii) the tangible personal property has been transferred to the purchaser of the service in conjunction with the rendering of the service subject to tax.

* * *

Example 4: A heating repairman paid tax on his purchase of parts to be used in servicing his customer's heating equipment. When he performs repair work subject to tax using such parts, he is entitled to a refund or credit of the tax he paid.

* * *

(c) No refund or credit is allowable for tax paid on tangible personal property purchased by a person performing a nontaxable service.

Section 541.2(p) of the Sales and Use Tax Regulations provides, in part:

(1) The terms rental, lease and license to use refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property.

(2) For the purposes of this Part, when a rental, lease or license to use a vehicle or equipment includes the services of a driver or operator, such transaction is presumptively the sale of a service, rather than the rental of tangible personal property, where dominion and control over the vehicle or equipment remain with the owner or lessor of the vehicle or equipment. . . .

* * *

Whether a transaction is a sale (license to use, rental or lease) of a vehicle or equipment or is the sale of a service, such as a transportation service, must be determined in accordance with the facts and circumstances of the particular transaction and provisions of the agreement between the contractor and his customer.

Technical Services Memorandum, entitled *Exemptions for Commercial Aircraft*, May 15, 1980, TSB-M-80(4)S, states in part:

The following list contains examples of purchases for qualifying exempt commercial aircraft and their taxable status, designated by "E" for exempt and "T" for taxable:

Purchases for Qualifying Exempt Commercial Aircraft

Aircraft for use in transporting persons or property for compensation primarily engaged in intrastate, interstate or foreign commerce.	E
Parts and accessories.	E
* * *	
De-icing.	E
Initial installation of equipment or accessories on aircraft.	E
Refurbishing interior of aircraft.	E
Food or drink sold to airlines for in-flight consumption.	E
Repairs (labor and parts).	E
* * *	
Baggage train charge - transport baggage between aircraft or terminal.	E
Baggage conveyor charge - transport baggage between aircraft or baggage train.	E
Baggage handling charge.	E
Aircraft cleaning charge.	E
* * *	
Fresh water charge for the service of placing fresh water on aircraft.	E
Lavatory service truck charge - used to remove refuse from aircraft, but not from airport holding tanks.	E
Power stairs charge - used by passengers and crew to board and leave aircraft.	T
Garbage disposal charge - to remove garbage from aircraft, but not trash removal from terminals or dumpsters.	E
Tickets, labels, tags.	T

	*	*	*	
Uniforms.				T
Manuals, guides and advertising materials.				T

Technical Services Memorandum, entitled *New York State Sales and Use Tax on Interior Cleaning and Maintenance Services*, January 22, 1991, TSB-M-91(4)S, states in part:

Effective June 1, 1990, a combined state and local sales tax is imposed on all charges for interior cleaning and maintenance services performed in New York State, regardless of whether performed on an as-needed (short-term) basis or long-term contractual basis.

* * *

Interior cleaning and maintenance services include ordinary janitorial services such as: dusting furniture, pictures, windowsills and ledges; vacuuming furniture and carpets; cleaning, disinfecting, and deodorizing bathrooms and bathroom fixtures; stripping, washing, waxing and buffing floors; cleaning appliances; cleaning ashtrays; changing linens; oiling door hinges; replacing light bulbs; replacing washers in faucets; adjusting thermostats; cleaning or changing filters; reading gauges and lubricating equipment; and cleaning outlets from stoves, ovens and plumbing fixtures. Interior cleaning and maintenance does not include services that are ordinarily viewed as “repair” services.

Opinion

Petitioner provides personnel that render services at airports for airlines. Charges are separately stated and billed directly to the airlines. Charges are generally computed based on the number of hours Petitioner’s personnel work for the airlines plus a surcharge for port fees. Charges for maintenance of tangible personal property and real property include the cost of materials as well as hourly labor charges.

Sales tax is imposed on the services of maintaining, servicing or repairing tangible personal property. See section 1105(c)(3) of the Tax Law. Section 1105(c)(3)(v) of the Tax Law provides an exemption for the maintenance and repair of commercial aircraft as specified in sections 1101(b)17 and 1115(a)(21) of the Tax Law.

Since Petitioner performs its services solely for commercial airlines, Petitioner’s charges for emptying the aircraft’s lavatories and de-icing the aircraft (ramp services) and

cabin appearance (items 1 and 2) are exempt under section 1105(c)(3)(v) of the Tax Law, if such services are performed upon qualifying commercial aircraft. See TSB-M-80(4)S, *supra*. Equipment used in performing such services also qualifies for exemption under section 1115(a)(21) of the Tax Law. However, if these services are performed on non-commercial aircraft, the charges are subject to tax under section 1105(c)(3). In such case, equipment used to perform such services is also taxable.

Petitioner's charges for repair and maintenance of real and tangible personal property (other than commercial aircraft), as well as its janitorial services (items 3, 4 and 5), are subject to sales tax whether or not provided to persons engaged in the operation of commercial aircraft. See sections 1105(c)(3), (5) of the Tax Law, and TSB-M-91(4)S, *supra*. When such services are performed in conjunction with the transfer of tangible personal property, the price of the tangible personal property is also subject to tax. Therefore, Petitioner's entire charge for maintenance, repair and janitorial services is taxable. See section 527.7(b)(3) of the Sales and Use Tax Regulations. However, to the extent that the machinery or equipment being serviced is used in the repair and maintenance of a commercial aircraft (e.g., repairing equipment used to de-ice a commercial aircraft), then services to such machinery or equipment are exempt from sales tax pursuant to section 1105(c)(3)(v) of the Tax Law.

Petitioner is required to pay sales tax on the purchase of tangible personal property used in providing repairs and maintenance services to real property. See section 1101(b)(4)(i) of the Tax Law. To the extent that the property is actually transferred to the customer in conjunction with a taxable repair and maintenance service, Petitioner may claim a refund or credit of sales tax paid on the purchase of such property. See section 1119(c) of the Tax Law. Petitioner is not entitled to a refund or credit of tax paid on the purchase of tangible personal property used in providing repairs and maintenance services to the extent that the tangible personal property is consumed by Petitioner in the performance of the services and is not transferred to the customer in conjunction with the repair and maintenance service. See sections 534.5(a)(2), (c) of the Sales and Use Tax Regulations. Also see *Koepke-Vragel*, Adv Op Comm T&F, July 1, 1998, TSB-A-98(44)S; *Armor Elevator Company, Inc.*, Adv Op Comm T&F, November 4, 1992, TSB-A-92(76)S.

Section 1105(c)(8) of the Tax Law imposes sales tax on protective and detective services. In *Compass Adjusters and Investigators, Inc. v Commissioner of Taxation and Finance*, 197 AD2d 38, the court indicated that "among the detective and protective services covered by Tax Law § 1105(c)(8) are those provided by detective agencies, but the Tax Law contains no definition of detective services or detective agency." In this regard, the Court found it appropriate to equate the terms "detective services" and "detective agencies" to the "broad definition of private investigator" found in section 71 of Article 7 of the General Business Law. Section 71(1) of such law provides, in part:

"Private investigator" shall mean and include the business of private investigator and shall also mean and include . . . *investigations for the purpose of obtaining information with reference to any of the following matters, notwithstanding the fact that other functions and services may also be performed for fee, hire or reward; crime or wrongs done or threatened against the government of the United States of America or any state or territory of the United States of America; the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation or character of any person, group of persons.* . . . (Emphasis added)

In the present case, the positive claim, ticket checker and security services (items 6,7 and 8) performed by Petitioner's personnel are protective in nature. Alternatively, these services fall within the scope of the above definition used by the Court in *Compass Adjusters and Investigators, Inc., supra*. Petitioner's services are not expressly excluded from this definition by any of the provisions of Article 7 of the General Business Law. Accordingly, receipts from Petitioner's positive claim, ticket checker and security services are subject to State and local sales taxes under section 1105(c)(8) of the Tax Law, whether provided to a commercial or non-commercial customer.

Petitioner's employees provide transportation for passengers by means of electric carts and wheelchairs depending on the passengers' needs. In most instances Petitioner does not own the equipment and thus simply provides the personnel to operate the equipment. In the few instances where Petitioner owns some wheelchairs, it does not transfer title or possession of the equipment to the airline. The equipment is used by Petitioner's employees in transporting passengers within the terminal areas and customers are billed by the number of hours Petitioner's employees are committed to such tasks. Therefore, Petitioner's charges for these services (items 9 and 10) are not subject to sales tax. See section 526.5(g)(3) of the Sales and Use Tax Regulations.

Section 1105(c) of the Tax Law imposes tax on the receipts from certain enumerated categories of services. Inasmuch as Petitioner's usher/escort services, sky cap services and baggage handling services (items 11, 12 and 13) do not come within the scope of any of the services taxed by section 1105(c) of the Tax Law, Petitioner's separately stated charges for these services are not subject to sales tax. See *Key Bank, N. A.*, Adv Op Comm T&F, November 6, 1989, TSB-A-89(40)S; *Jacqueline Holtzman*, Adv Op Comm T&F, April 17, 2001, TSB-A-01(12)S.

Petitioner's charge for port and depreciation fees (items 14 and 15) are merely "overhead" costs and expenses of Petitioner which are passed along to the airlines. Thus, such charges are part of Petitioner's receipts. See section 1101(b)(3) of the Tax Law and section 526.5(e) of the Sales and Use Tax Regulations.

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Therefore, when the port fee percentage is applied to the sale of the repair and maintenance of real and tangible personal property, janitorial services, and security services (items 3 through 8), the total charge, including the surcharge, is subject to tax. When the surcharge is applied to the sale of nontaxable services, the total charge, including the surcharge is not subject to tax. When the charges for depreciation fees relate to equipment used to perform nontaxable services, such charges are not subject to tax. However, charges for depreciation fees which relate to equipment used to perform taxable services (items 3 through 8) are an expense of providing such taxable services, and such charges are part of the receipt subject to tax.

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/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.